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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court, reported at 242 F. Supp. 14, is set out in Appendix A, *infra*, pp. 20-39. The report of the Interstate Commerce Commission is printed at 320 I.C.C. 122.

JURISDICTION

This action was instituted under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 to set aside orders of the

Interstate Commerce Commission. The judgment of the lower court, constituted as a three-judge district court (Appendix B, *infra*, pp. 40-41), was entered May 13, 1965, and the Commission filed its notice of appeal on July 12, 1965.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by *United States* v. *Drum*, 368 U.S. 370.

STATUTES INVOLVED

Section 5(2)(b), 5(2)(c) and 5(11) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(b), 5(2)(c) and 5(11), the National Transportation Policy, 49 U.S.C. preceding § 1, and sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21, are set forth in Appendix C, *infra*, pp. 42-46.

QUESTION PRESENTED

By its orders set aside by the district court, the Interstate Commerce Commission conditionally approved the proposed merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company.

A single question is presented by this appeal:

Whether the district court erred in holding that the Commission, in giving weight to the antitrust policy of the Nation in its determination of whether a proposed merger of railroads would be consistent with the public interest under section 5(2)(b) of the Interstate Commerce Act, is required to make findings

as to the probable anticompetitive effect of the merger in terms of the precise language of section 7 of the Clayton Act and upon a market-by-market analysis of the products or services and geographic areas involved, as made in *Brown Shoe Co.* v. *United States*, 370 U.S. 204, and other decisions not involving railroad mergers.

STATEMENT

By joint application filed with the Commission on July 22, 1960, Seaboard Air Line Railroad Company and Atlantic Coast Line Railroad Company sought authorization for their merger, under Section 5(2)(b) of the Interstate Commerce Act.

Following complete administrative proceedings,[1] the Commission, with two Commissioners dissenting, on December 2, 1963, approved the proposed transaction, subject, however, to employee protective and traffic conditions.

In its 117-page report, the Commission undertook a searching analysis of all of the issues posed by the application. 320 I.C.C. 206. Foremost among these was whether the merger would have such anticompetitive consequences as to render impossible the accomodation of section 5(2)(b) and the antitrust legislation. 320 I.C.C. 128-29.

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[1] The hearings lasted 35 days, covering 5,418 pages of transcript. Additionally, 101 statements of witnesses were received as if read into the record, and 271 exhibits, offered in evidence. Argument was had before the entire Commission on May 7 and 8, 1963.

The Commission recognized that the merger of these two railroads, by terminating the competition that had existed between them, would leave a number of communities and a large portion of the State of Florida without the direct service of any other railroad. 320 I.C.C. 163, 211. Nevertheless, effective railroad competition would remain in the area of the Southeastern States, particularly, on traffic from and to the major gateway points, practically all of which are served by the Southern Railway System, and the Commission assured the continued vitality of competitive rail service by the imposition of extraordinary conditions, affording shippers and other railroads routes alternative to those of the merged company. 320 I.C.C. 180, 208, 267.

However, the Commission noted that the need for preserving intramodal rail competition has diminished. 320 I.C.C. 166, 210. The Nation's railroads increasingly are losing traffic to truck, water and other modes of transportation, particularly in the area served by the Seaboard and Coast Line. 320 I.C.C. 149, 210. The Commission found that the applicant railroads, caught between the need for increasing their charges to cover ascending costs and an inability to do so posed by the threat of further traffic diversions, were in need of affecting the economies and efficiencies that their merger would afford. 320 I.C.C. 153, 210.

The Commission found that the merger of the Coast Line and Seaboard would yield to the merged company savings of at least $20 million a year. 320 I.C.C. 159. More importantly, the Commission, 320

I.C.C. 160, found, "As a result of proposed changes in freight train operations and the use of shorter routes, as discussed in detail in the examiner's report, the merged company will provide improved and more expeditious freight schedules between the principal terminals presently served by Seaboard and Coast Line." In addition, the Commission said, "[I]t can be anticipated that benefits will be derived from (1) more flexible schedules and more direct routes; (2) the elimination of interchanges and delays in transit; and (3) the simplification of transit arrangements and greater flexibility in arranging stopoff points. Reduction in shipping costs can be anticipated from the elimination of wasteful and unneeded transport facilities, the substitution of single-line rates on certain commodities, and the elimination of switching charges. A more adequate car supply, the availablity of more specialized equipment, and more efficient utilization of equipment should result." *Id.*

On balance, the Commission decided that authorization of the proposed transaction would be consistent with the public interest. It concluded, 320 I.C.C. 212, "In our determination, we are required to give consideration to the effect that the merger would have upon competitors and on the general competitive situation in the railroad industry in the light of the objectives of the national transportation policy. *McLean Trucking Co.* v. *United States, supra.* We have carefully evaluated the effects of the curtailment of competition that will result from the merger and when considered in connection with the advantages of the merger, including improved service, safer oper-

ations, and lower costs, we are convinced that the advantages of the merger far outweigh the potential disadvantages."

The Florida East Coast Railway Company, one of the railroads claiming to be injured by the merger of the Coast Line and Seaboard, instituted this action on March 18, 1964, following the Commission's partial denial on March 4, 1964, of petitions for reconsideration of its report and order. Southern and the Railway Labor Executives' Association subsequently intervened as parties plaintiff, and Coast Line, Seaboard, the Atlantic Coast Line Company and the Mercantile-Safe Deposit and Trust Company intervened as parties defendant in support of the challenged orders of the Commission. The United States, statutory defendant, confessed error and took the position that the merger of the Coast Line and Seaboard "should be permanently enjoined."

The lower court's decision, from which this appeal is taken, turns, essentially on but a single point—the failure of the Commission "to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger." *Infra*, p. 29; 242 F.Supp. 20. More specifically, the court said, *infra*, pp. 32-33; 242 F.Supp. at 22:

> [W]e hold that the Commission must define the "line of commerce" and the "section of the country" in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly." The reason the Commission

> must make such findings is, most precisely, the fact that antitrust policy, to be given any effect whatsoever, must be measured in terms of criteria that have been developed by Congress and the courts. If an erroneous statutory construction lies hidden in vague or insufficient findings then important statutory prerequisities to merger may be overlooked. [Footnotes omitted.]

Deeming this Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), to have marked a change in the requirements upon the Commission as enunciated in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), and *Minneapolis & St. L. Ry. Co.* v. *United States*, 361 U.S. 173 (1959), the district court concluded, *infra*, p. 33; 242 F.Supp. at 22, that "the Commission has failed to make sufficient findings to accomodate section 5 (2) of the Interstate Commerce Act with section 7 of the Clayton Act."

The district court set aside the Commission's orders, declining specifically to pass upon two relatively narrow issues, namely, the adequacy of the labor protective conditions and the status for certain regulatory purposes of the Mercantile-Safe Deposit and Trust Company, a holding company.

THE QUESTION IS SUBSTANTIAL

The court below held that before the Commission may authorize a merger of railroads pursuant to Section 5(2)(b) of the Interstate Commerce Act, it must make findings as to the competitive effects of the proposed merger in terms of the specific criteria of Sec-

tion 7 of the Clayton Act as developed and applied by the courts in non-transportation cases (such as *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) and *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963)). In so holding, the court below considered inapposite this Court's decisions in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959), that in passing upon proposed carrier unifications the Commission need not apply antitrust criteria to determine whether such transactions, absent its approval, would violate either the Sherman or Clayton Acts. The court below erroneously concluded that such a result was compelled by the 1950 amendment to Section 7, as interpreted by this Court in *Brown Shoe*. Moreover, the lower court's decision can only serve to complicate and prolong the proceedings before the Commission upon applications for approval of any significant railroad merger.

1. Prior to 1920, the railroads were subject to the antitrust laws and it was clear that any unification of major railroads which competed to any significant extent would violate the Sherman Act (*Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904); *United States* v. *Union Pacific R. Co.*, 226 U.S. 61 (1912); *United States* v. *Reading Co.*, 253 U.S. 26 (1920); *United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922)), to say nothing of Section 7 of the Clayton Act.

This Court has recognized repeatedly that the Transportation Act of 1920 (41 Stat. 456) marked a sharp change in Congressional policy toward the

structure of the railroad industry. "The 1920 Act required the Commission to prepare and adopt a plan for nation-wide consolidations of the railway properties of the country. It made this master plan the governing consideration in approving voluntary consolidations of railroads which were permitted only if in harmony with and in furtherance of the Commission's over-all plans." *Schwabacher* v. *United States*, 334 U.S. 182, 192 (1948). With the failure of the "plan" approach (*id.* at 193), the Transportation Act of 1940 rewrote Section 5 of the Interstate Commerce Act into substantially its present form. Under it, the Commission is authorized to approve a carrier-initiated consolidation if it finds that the proposed transaction, subject to such conditions as it may impose, "will be consistent with the public interest" and upon just and reasonable terms and conditions. Section 5(2)(c) provides that "the Commission shall give weight to the following considerations among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include other railroads in the territory involved * * *; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." Section 5(11) provides that the participants in a carrier unification approved by the Commission "shall be and they are hereby relieved from the operation of the antitrust laws."

This Court has recognized that "The congressional purpose in the sweeping revision of Section 5 of the Interstate Commerce Act in 1940, enacting Section

5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system. * * * The very language * * * expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States*, 356 U.S. 412, 418-419 (1958).

In *McLean Trucking Co.* v. *United States*, *supra*, involving a consolidation of motor carriers, this Court dealt specifically with the criteria which the Commission is to apply in administering Section 5. From the 1920 shift in Congressional policy, this Court concluded that "The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of Section 5(11), that the policies of the antitrust laws determine 'the public interest' in railroad regulation only in a qualified way," that "there can be little doubt that the Commission is not to measure proposals for all-rail * * * consolidations by the standards of the antitrust laws," and that "in authorizing those consolidations it did not import the general policies of the antitrust laws as a measure of their permissibility." (321 U.S. at 83, 84-85). This Court further emphasized in *McLean* that:

> * * * the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals

> specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

At the same time in *McLean* this Court held that the Commission is not to ignore the policy of the antitrust laws, but must:

> * * * consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.
>
> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the overall transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. * * * (321 U.S. at 86-87).

As this Court recognized in *McLean*, its conclusions with respect to a motor carrier merger apply *a fortiori* to a proposed rail merger because of the special Congressional policy of facilitating rail unification.

Fifteen years later, in *Minneapolis & St. Louis R. Co.* v. *United States*, *supra*, 361 U.S. at 186, this Court, with one justice dissenting, in rejecting a claim that an approved rail unification would violate Section 1 of the Sherman Act and Section 7 of the Clay-

ton Act, reaffirmed the entire rationale of *McLean* as stated above, and added that:

> Section 5(11) is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act, and in terms relieves the acquiring carrier, upon approval by the Commission of the acquisition, "from the operation of the antitrust laws. . . ." Although § 5(11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws." 321 U.S. at 85-86. * * *

Relying upon *McLean* and *Minneapolis & St. L.*, the Commission made extensive findings as to the competitive consequences of a Seaboard-Coast Line merger upon competing carriers, shippers and localities, but, as in other recent rail unification proceedings, it did not make findings in terms of antitrust violations. The Commission reviewed the competitive situation generally throughout the Southeastern States and gave particular attention in its decision to those areas in which the likely impact would be the greatest. For example, the Commission noted, 320 I.C.C. at 164, that: "The situation at Tampa and in the central and western portions of Florida is unique in that those areas are served by no other railroads except Seaboard and Coast Line." While termed by it a "diminution of competition within the State of

Florida" that would be "largely a matter of degree", the Commission nevertheless recognized that the proposed transaction would result in a "rail monopoly". *Id.* In short, said the Commission, 320 I.C.C. at 166, "There is no question that there will be a significant reduction in rail competition in Florida." The Commission could have added that such substantial lessening of competition alone, would be violative of section 7 of the Clayton Act, but, as the court below admitted, it was not required to do so under this Court's decisions in *McLean* and *Minneapolis & St. L.*

The court below conceded that to hold that the Commission must measure the competitive effects of a rail merger by the specific criteria of Section 7 of the Clayton Act "may seem contrary" to this Court's *McLean* and *Minneapolis & St. L.* decisions (*infra*, p. 26; 242 F. Supp. 19). However, it proceeded to distinguish *McLean* on the ground that the Commission has "no jurisdiction to enforce the proscriptions of the Sherman Act", *id.*, asserting that the Commission's jurisdiction under Section 11 of the Clayton Act to enforce Section 7 "where applicable to common carriers" converted the latter into "an additional 'frame of reference within which the Commission operates' ". *Infra*, p. 28, 242 F. Supp. at 20. *Minneapolis & St. L.*, which considered both the Sherman and Clayton Acts in relation to Section 5(11), was held by the lower court to be inapposite largely on the ground that, although decided in 1959, it did not take into account the 1950 amendment to Section 7 of the Clayton Act which "is later in time" than Sec-

tion 5, and was decided prior to *Brown Shoe Co.*, "the first case to consider the background of the 1950 amendments to section 7 of the Clayton Act." *Infra*, p. 31, 242 F. Supp. at 21.

In thus infusing the market and geographic criteria of Section 7 into proceedings under Section 5 of the Interstate Commerce Act, the court below overlooked the fact that Sections 7 and 11 of the Clayton Act were as applicable as the Sherman Act in *McLean* (as noted by both the lower court in that case, 48 F. Supp. at 935, and by the minority in this Court, 321 U.S. at 93). It speculated that in deciding *Minneapolis & St. L.* in 1959 this Court overlooked the 1950 amendment to Section 7. The lower court overlooked the fact that the 1950 amendment to Section 7 reached only mergers effected by asset acquisitions between corporations "subject to the jurisdiction of the Federal Trade Commission" and simultaneously provided that "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the * * * Interstate Commerce Commission * * *." It wholly ignored the fact that in 1962, with the instant and other major rail unification proposals pending before the Commission, the Congress did not even consider seriously a proposal to subject proposed rail mergers to Section 7. See *Hearings on S. 3097 before a Subcommittee of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. (1962).

The court below purported to give effect to the express exemption from the antitrust laws conferred by Section 5(11) of the Interstate Commerce Act by

stating that "the Commission with propriety may approve a rail consolidation, otherwise prohibited by the antitrust laws, in order to bring about needed or desirable improvement in service and economies in operation". *Infra*, p. 30, 242 F. Supp. at 21. Nevertheless, we submit that no one can safely assume that the decision below is merely a requirement of additional "findings", leaving uneroded the substantive principle of *McLean* and *Minneapolis & St. L.* A requirement of findings is meaningless unless it involves potential substantive consequences. *Davis, Administrative Law Treatise*, sec. 16.09. Here the court below stated that where a proposed merger would violate Section 7 "the prohibition of the Clayton Act must be given weight." *Infra*, p. 29, 242 F. Supp. at 20. And relying upon the principle that "immunity from the antitrust laws is not lightly implied" (inapposite here where express immunity has been granted), the lower court reasoned that "When an agency, such as the Interstate Commerce Commission, is entrusted by Congress with authority to require compliance with Section 7 of the Clayton Act, and also to grant relief from the operation of the antitrust laws, the logical corollary would be that the Commission will not grant immunity from the antitrust laws unless clearly authorized by the law and required by the evidence."[2] *Id.* At the least, the grudging ap-

[2] A suggestion of substantive implications may also be found in the further statement of the lower court that the Commission must make findings in terms of Section 7 criteria because "If an erroneous statutory construction lies hidden in vague or insufficient findings then important statutory prerequisites to merger may be overlooked". *Infra*, p. 33, 242 F. Supp. 22.

proach of the court below wholly ignores the special Congressional policy toward railroad unification. At the most, it imports the specific criteria of Section 7 into the determination of rail unification problems—in the teeth of this Court's *McLean* and *Minneapolis & St. L.* decisions. Upon any reading, the decision below calls for authoritative determination by this Court of the criteria to be applied in rail unification proceedings.

2. Even if the decision below were regarded as imposing only a requirement as to the kind of findings by which the Commission must measure the competitive consequences of a proposed railroad merger, it has created uncertainty which could have a crushing impact upon administrative proceedings on such merger applications. Whether or not intended by the court below, its decision is open to the construction that in such a proceeding the parties must develop a record which will enable the Commission to make findings identifying every geographic and service market or submarket which the courts might regard as the appropriate "line of commerce" or "section of the country" for the purposes of Section 7 of the Clayton Act. Thus, the court below noted that "It may be that the relevant geographical market is the Southeastern States as a whole, but "under other circumstances it may be as small as a single metropolitan area". *Infra*, pp. 34-35; 242 F.Supp. at 23. It also noted that "It may be that the relevant service market includes modes of transportation other than railroads", but that "it may be that railroads constitute a submarket for the transportation of heavy-

loading, low value bulk commodities due to cost and service advantages available to railroads". *Infra*, pp. 35-36.

However, the decision below leaves wholly uncertain the detail in which applicants and the Commission must identify geographic markets and submarkets in which they compete and in which such markets must be related to service submarkets, or in which they must measure service markets (by commodities) in terms of the "interchangeability of use or the cross-elasticity of demand" between the various rail services of the applicants and those of competing motor and water carriers. Further uncertainty flows from the lower court's holding that "[W]e do not think routing and gateway conditions can be meaningful in terms of the 'public interest' as affected by the Clayton Act unless they are imposed by reference to the product market and the geopraphic market." *Infra*, p. 32, 242 F. Supp. at 21-22. In view of the complex competitive consequences of any significant rail unification, such uncertainty alone constitutes a major impediment to effective implementation of the Congressional policy underlying Section 5 of the Interstate Commerce Act.

3. The concepts of "relevant geographic market" and "relative service market" evolved in industrial merger cases under section 7 of the Clayton Act, moreover, do not lend themselves to translation into meaningful measures of the anticompetitive effects of a railroad merger. The few variables appropriate to a determination of the former become so numerous and complex to render them incomprehensible in an at-

tempted delineation of the latter. The factors of gender, style and price limiting the competition of shoes, for example, are a far cry from the considerations entering into a shipper's choice of competing rail routes, such as the location of his plant in relation to the lines of the railroads, the location of the consignees' plant, the availability of switching services, the charges for switching services, if any, the scheduling of trains, the routing of inbound shipments, the supply of desired cars, the incidence of loss and damage, the provision of transit, reconsignment and other ancillary services, the charges for such services as well as for the line haul, the reciprocity of dealings with the carrier and so on. And whereas the competition for shoes occurs in readily defineable communities or sections of the country, the competition between railroads extends from the hundreds of points that each may serve directly to the thousands of points that it reaches through connecting lines. Moreover, while the customer for shoes cannot practicably substitute another product for them, the user of rail services in most instances can select from among a wide variety of alternative transportation media.

Clearly, undertaking the development and analysis of competitive effects in terms of the industrial merger cases under section 7 of the Clayton Act will prolong and complicate administrative proceedings which are already long and costly by any standard. We submit that this practical impact is far too high a price to be paid for a requirement that the Commission make findings as to the obvious fact that mergers of railroads which compete to any significant extent almost invariably would violate the antitrust laws.

There are now pending before the Commission in various stages such rail unification proposals as Great Northern-Northern Pacific-Burlington, New York Central-Pennsylvania, Union Pacific-Rock Island, and Chicago & Northwestern-Chicago Great Western. Their pendency underscores the need for authoritative determination by this Court of the standards to be appiled by the Commission in measuring the competitive effects of such transaction.

CONCLUSION

This appeal presents a question of substantial importance, and probable jurisdiction should be noted.

Respectfully submitted.

ROBERT W. GINNANE,
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Interstate Commerce Commission,
Washington, D. C. 20423.

SEPTEMBER 1965

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 64-64-Civ. J.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Florida East Coast Building, St. Augustine, Florida, PLAINTIFF

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

(Filed May 13, 1965, Jacksonville, Fla.)

Before RIVES, *Circuit Judge*, and SIMPSON and MCRAE, *District Judges*.

OPINION

RIVES, *Circuit Judge*:

This is an action to enjoin, annul, and set aside orders of the Interstate Commerce Commission[1] which, subject to routing and gateway conditions and employee protective conditions, authorize the merger of the Atlantic Coast Line Railroad Company into Seaboard Air Line Railroad Company and the related acquisition of control by Seaboard of car-

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[1] See 49 U.S.C. § 17(9); 28 U.S.C. § 2321.

riers subsidiary to or affiliated with Atlantic Coast Line, most prominently including Louisville and Nashville Railroad Company. Florida East Coast Railway Company brought the action against the United States and the Interstate Commerce Commission.[2] Since the Attorney General, representing the United States,[3] opposes the merger, the United States has been realigned as a party plaintiff. Jurisdiction of this court is provided by 28 U.S.C. § 1336, and a district court of three judges has been convened as required by 28 U.S.C. § 2325.

Plaintiff Florida East Coast Railway Company, a Florida corporation, has its principal office at Saint Augustine, Saint Johns County, Florida, which is in the Middle District of Florida. Hence venue is properly laid in the Middle District. See 28 U.S.C. § 1398.

The Railway Labor Executives' Association, the Southern Railway Company, and its affiliated companies in the Southern Railway System intervened as parties plaintiff. The Mercantile-Safe Deposit and Trust Company, the Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company and The Atlantic Coast Line Company intervened as parties defendant in support of the challenged orders of the Commission.

Florida East Coast's motion for an order restraining temporarily the operation and effective date of the orders of the Interstate Commerce Commission, pending the final hearing and determination of the action, see 28 U.S.C. § 2324, was granted by the Honorable Bryan Simpson, Chief Judge, United States District Court for the Middle District

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[2] See 28 U.S.C. §§ 2322, 2323; 49 U.S.C. § 17(9).

[3] See 28 U.S.C. § 2323.

of Florida, based on the specific finding that irreparable damage would result to the plaintiffs if the temporary restraining order was not granted. See 28 U.S.C. §§ 2284(3), 2325.

The Commission stated that the merger it approves[4] would result in the elimination of present competition between Seaboard and Atlantic Coast Line in a six-state area.[5] In the six-state area and in an eight-state area,[6] the merged company would control more than 54 per cent of the total railroad mileage, while the Southern Railway Company, its nearest competitor, would have about 34 per cent. The merged company would have approximately 81 per cent of the railway mileage in Florida. See *Seaboard Air Line R.R.*, 320 I.C.C. 122, 163 (1963). Approximately 4,257 jobs would be abolished and the location of employment would be changed for 4,439 other employees, 320 I.C.C. at 154. The Commission found that: the reduction of rail competition caused by the proposed merger will not be substantial; ample competitive rail service will remain after the merger throughout most of the affected area; and the reduction in competition that will result from the merger will have no appreciable injurious effect upon shippers and communities. 320 I.C.C. at 167. The Commission noted that the merger will have substantial adverse effects upon many railroad employees and their families, but, in the long run, the merger would provide greater job security

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[4] Commissioner Webb, with whom Commissioner Tucker joined, dissented.

[5] The six states are Alabama, Florida, Georgia, North Carolina, South Carolina and Virginia.

[6] The additional states are Tennessee and Kentucky.

and more stabilized conditions of employment for employees of the merged company. See 320 I.C.C. at 200. Both Seaboard Air Line and Atlantic Coast Line are currently in healthy financial condition.

The questions raised in this three-judge district court action deal with the protective conditions for employees and with the relationship between section 5(2)[7] of the Interstate Commerce Act—which authorizes the Commission to approve proposed mergers that are found to be in the "public interest"[8]—and the antitrust laws, more specifically section 7 of the Clayton Act.[9]

Plaintiff Florida East Coast suggests that the ultimate importance of this case is that the Commission has written preservation of competition and prevention of monopoly out of the concept of "public interest."

Section 5(2)(c) of the Interstate Commerce Act, which sets forth certain factors which must be considered by the Commission in passing upon any proposed railroad merger or affiliation, does not expressly require that the Commission consider the antitrust laws as a factor in the public interest. The Commission is required by section 5(2)(c) to

> "give weight to the following considerations, *among others*: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include,

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[7] 49 U.S.C. § 5(2).

[8] 49 U.S.C. § 5(2)(b); see *e.g.*, Phillips, Railroad Mergers: Competition, Monopoly, and Antitrust, 19 Wash. & Lee L. Rev. 1, 9 (1962).

[9] 15 U.S.C. § 18.

other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." [10]

However, the Commission has long been required "to give weight to the antitrust policy of the nation before approving mergers and consolidations." [11] The antitrust laws are expressly considered in section 5(11) of the Act which exempts carriers and individuals participating in an approved merger

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[10] 49 U.S.C. § 5(2)(c). (Emphasis added.) The Act of Sept. 18, 1940, ch. 722, tit. I § 1, 54 Stat. 899, which amended the Interstate Commerce Act, set forth the "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*"

49 U.S.C.A. (Historical note following table of contents). (Emphasis supplied.)

[11] Georgia v. Pennsylvania R.R., 1945, 324 U.S. 439, 456.

> "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved .... and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transactions." [12]

The Commission has been required to accommodate section 5(2) and the antitrust legislation due to the presence of the section 5(11) exemption [13] and the history of the development of the national transportation policy. [14]

In giving weight to antitrust policy as a factor in the "public interest," plaintiff Florida East Coast contends that the Commission must define the "line of commerce" (relevant product, or services, market) and "section of the country" (relevant geographical market) in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be

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[12] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 76-77; 49 U.S.C. § 5 (11). In cases of affiliation of a motor carrier with a railroad, the Commission cannot approve the merger "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." 49 U.S.C. § 5(2)(b).

[13] Minneapolis & St. L. R.R. v. United States, 1959, 361 U.S. 173, 186.

[14] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 79.

substantially to lessen competition" or "tend to create a monopoly." [15]

On its face this contention may seem contrary to the Supreme Court's decision in *McLean Trucking Co.* v. *United States*.[16] *McLean* involved the Commission's approval of the consolidation of seven large motor carriers. The most important effect of the merger was to create an end-to-end consolidation from points in the far South to New England, with obviously large possibilities for through service.[17] The

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[15] Section 7 of the Clayton Act provides in part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

. . . . . .

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . ."

15 U.S.C. § 18.

[16] 321 U.S. 67 (1944).

[17] See *id.* at 71.

order approving the consolidation was attacked on the ground that the merger, notwithstanding Commission approval, violated the Sherman Act [18] and, hence, the Commission had no power to approve the merger. The Court decided that the Commission is not required to decide definitively whether the transaction violated the Sherman Act, but that the Commission's role is to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." [19] However, *McLean* does not dispose of the plaintiff's contention. Basic to the Court's determination in that case was the holding that the Commission has no jurisdiction to enforce the proscriptions of the Sherman Act. The Court stated:

> "To secure the continuous, close and informal supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus here, *the Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint*

[18] See 15 U.S.C. §§ 1-3.

[19] *Id.* at 87.

> *of trade or an attempt to monopolize which is forbidden by that Act.* The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action."

321 U.S. at 79-80 (Emphasis supplied.) In sharp contrast to the Commission's lack of jurisdiction to enforce the Sherman Act, Congress by section 11 of the Clayton Act has entrusted the Commission with authority to enforce compliance with section 7 and other Clayton Act provisions "when applicable to common carriers" under the Commission's jurisdiction.[20] While "the Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems," the Clayton Act legislation constitutes an additional "frame of reference within which the Commission operates." [21]

We think *Minneapolis & St. L. Ry.* v. *United States*,[22] a decision more recent than *McLean*, recognizes that the Commission's estimate of the scope and appraisal of the effects of any curtailment of competition which might result from a merger is to be initially and properly approached in terms of whether the effect is "substantially to lessen competition, or

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[20] 15 U.S.C. § 21. See Georgia v. Pennsylvania R. R., 1945, 324 U.S. 439, 456 and n. 9.

[21] See McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 79-80.

[22] 361 U.S. 173 (1959).

to tend to create a monopoly." In *Minneapolis* the Commission found that a proposed railroad acquisition "would not result in any significant [much less substantial] lessening of competition." [23] Its determination was said to rest upon "adequate findings." [24]

There is an additional reason why the Commission is required to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger. It would seem that the Commission is required to "give weight" to antitrust policy in a section 5(2) proceeding only if the merger has the probable anticompetitive effect proscribed by section 7 of the Clayton Act. More specifically, when the effect of a proposed merger "may be substantially to lessen competition" or "to tend to create a monopoly," "in any line of commerce in any section of the country," the prohibition of the Clayton Act must be given weight. Conversely, when the proposed merger would not so result, the Commission is not required to give weight to antitrust policy. The Commission impliedly recognizes such a principle in its finding in the present case that the reduction of rail competition caused by the proposed merger will not be substantial. 320 I.C.C. 167.

Furthermore, it has long been settled that "immunity from the antitrust laws is not lightly implied." [25] When an agency, such as the Interstate Commerce Commission, is entrusted by Congress with authority to require compliance with section 7 of the Clayton Act,[26] and also to grant relief from the op-

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[23] *Id.* at 188, 189.

[24] *Id.* at 189.

[25] See, *e.g.*, United States v. Philadelphia Nat'l Bank, 1963, 374 U.S. 321, 348.

[26] 15 U.S.C. § 21.

eration of the antitrust laws,[27] the logical corollary would be that the Commission will not grant immunity from the antitrust laws unless clearly authorized by the law and required by the evidence.

For that policy to have any real substance the Commission is required to determine whether or not the effect of the proposed merger "may be substantially to lessen competition" or "to tend to create a monopoly," "in any line of commerce in any section of the country." That does not mean that the Commission may authorize only those acquisitions which would not offend section 7 of the Clayton Act.[28] The Commission with propriety may approve a rail consolidation, otherwise prohibited by the antitrust laws, in order to bring about needed or desirable improvement in service and economies in operation.[29] In other words, if the Commission finds that the policy of the Transportation Act would be thwarted unless a particular type of merger or consolidation were permitted, it would be authorized to approve the merger or consolidation, although the transaction would otherwise violate section 7 of the Clayton Act.[30]

Concomitant to the Commission's determination of whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly," the Commission must define the area of effective competition by reference to a product, or

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[27] 49 U.S.C. § 5(11).

[28] See Minneapolis & St. L. Ry. v. United States, 1959, 361 U.S. 173, 187.

[29] See McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 78.

[30] See *id.* at 94 (dissenting opinion).

service market (the "line of commerce") and a geographic market (the "section of the country").[31]

We note that in *Minneapolis & St. L. Ry., supra,* which considered both the Sherman Act and section 7 of the Clayton Act, the Supreme Court did not expressly direct the Commission to define the relevant market by delineating a service market and a geographical market. However, that case was decided prior to *Brown Shoe Co.* v. *United States,* 1962, 370 U.S. 294. *Brown Shoe* was the first case to consider the background of the 1950 amendments to section 7 of the Clayton Act. In *Brown Shoe,* the Supreme Court set forth directions for measuring the relevant market within which the anticompetitive effects of a merger are to be judged.[32]

There is an additional reason for requiring the Commission to determine the product market and the geographic locus of competition. The Commission imposed routing and gateway conditions for the benefit of the intervening railroads to offset possible diversion of traffic by the merged company. It noted that "absent suitable protective conditions and con-

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[31] See Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 324.

[32] Although Minneapolis & St. L. Ry. was decided in 1959, it is clear that only section 7 of the Clayton Act as enacted in 1914 was involved in that case and dealt with by the Court. See 361 U.S. at 185 & n. 11. The Court stated that "section 5(11) is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act . . . ." 361 U.S. at 186. However, the 1950 amendment to the section 7 of the Clayton Act is later in time than either section 5(11) or section 5(2) of the Interstate Commerce Act. Compare 15 U.S.C.A. § 18 (Historical note), with 49 U.S.C.A. § 5(2) (Historical note) and 49 U.S.C.A. § 5(11) (Historical note).

sideration of these factors [the public advantage that will accrue from the merger], there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws." [33] We think it clear as the Commission has recognized, that routing and gateway conditions bear a distinct relationship to the possible anticompetitive effects of the merger. Moreover, we do not think routing and gateway conditions can be meaningful in terms of the "public interest" as affected by the Clayton Act unless they are imposed by reference to the product market and the geographic market. The Commission's primary concern is the "public interest," not "private interest." To impose routing and gateway conditions outside the context of the relevant markets either fails to employ Clayton Act standards as relevant to the public interest or assumes that private interest is consistently compatible with the public interest.

Therefore, we hold that the Commission must define the "line of commerce" and "section of the country" in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly." The reason the Commission must make such findings is, most precisely, the fact that antitrust policy, to be given any effect whatsoever, must

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[33] 320 I.C.C. at 167. Compare 320 I.C.C. at 188. "We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation."

be measured in terms of criteria that have been developed by Congress and the courts.[34] If an erroneous statutory construction lies hidden in vague or insufficient findings then important statutory prerequisites to merger may be overlooked.[35]

Applying that holding to the present case, we conclude that the Commission has failed to make sufficient findings to accommodate section 5(2) of the Interstate Commerce Act with section 7 of the Clayton Act.

The Commission's conclusion concerning the anticompetitive effects of the proposed merger is reflected in its following statement:

> "Except in portions of Florida, the over-all reduction in rail competition in the Southeastern States will be relatively moderate and inconsequential when viewed in the light of the alternative rail service that will be provided by competitors of the merged company at most of the major industrial centers in the affected area. With few exceptions, vigorous rail competition will continue to flourish in the territory served by the merged company. The impact of any lessening of rail competition that might result from this merger will be minimized by the increasingly strong competition that the merged

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[34] In a recent article Professor Handler and Mr. Robinson have noted that "whatever the guidelines for ascertaining whether a merger may have the proscribed anticompetitive effects, they are not in the legislative text and must inevitably be defined by the highest court." Handler & Robinson, *The Supreme Court* v. *Corporate Mergers*, Fortune, January, 1965.

[35] See United States v. Carolina Carriers Corp., 1942, 315 U.S. 475, 489.

company will encounter from other modes of transportation."

320 I.C.C. at 211, 212. The Commission noted that Tampa and the central and western portions of Florida are served by no other railroads except Seaboard and Atlantic Coast Line. It recognized that the merger would supplant the duopoly with a rail monopoly. 320 I.C.C. at 164-165. The Commission's conclusion that the reduction of rail competition caused by the proposed merger would not be substantial, 320 I.C.C. at 167, was determined by reference to rail competition in the Southeastern States as a whole.[36] Furthermore, the Commission noted the growth in motor and water transportation service in recent years in Tampa and the surrounding area. See 320 I.C.C. at 152-53. And its conclusion that the reduction in competition that will result from the merger will have no appreciable injurious effect upon shippers and communities, 320 I.C.C. at 167, was apparently by reference to other modes of transportation—motor carriers, air carriers, water carriers and pipelines—operating in the Southeastern States.

It may be that the relevant geographical market

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[36] The Supreme Court has noted that "if anticompetitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed . . . . [by section 7]. To illustrate: If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger [under section 7] in those markets in which competition might be adversely affected. On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed." Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 337 & n. 65.

is the Southeastern States as a whole. But the proper question to be asked in determining the appropriate "section of the country" is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." [37] The geographic market selected must both correspond to the commercial realities of the industry and be economically significant. Although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.[38]

It may be that the relevant service market includes modes of transportation other than railroads. But the fact that other modes of transportation operate within the geographic area or areas, within which the anticompetitive effects of a merger are to be judged, is not determinative of the relevant service market. Similarly, reference to tonnage and dollar aggregates to show the decline of railroad transportation and rise of other modes of transportation, and such statistics as the number of truck registration in an area, are not, in themselves, determinative. The outer boundaries of a service market are to be determined by the reasonable interchangeability of use or the cross-elasticity of demand between the service itself and substitutes for it. It should be noted, however, that within this broad market, well-defined submarkets may exist, which in themselves constitute service markets for antitrust purposes. The bound-

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[37] United States v. Philadelphia Nat'l Bank, 1963, 374 U.S. 321, 357.

[38] See Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 336-37.

aries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the service's peculiar characteristics and uses, unique service facilities, distinct customers, distinct prices and sensitivity to price changes.[39]

The United States, acting through the Attorney General, requests that the merger of Seaboard Air Line and Atlantic Coast Line be *permanently* enjoined. While a three-judge district court has power to enjoin the *orders* of the Commission authorizing a merger, we doubt if such a court has the power to permanently enjoin the *merger*. See 28 U.S.C. § 2321. Furthermore, the three-judge district court is limited to determining whether the Commission made any errors of law, whether its action was arbitrary, capricious, or an abuse of its discretion, and, upon review of the whole record, whether its findings of fact are supported by substantial evidence.[40] The United States' request that this Court permanently enjoin the merger would require that the Court go beyond the present record. We would have to find that upon no set of facts which the applicants might present could the merger be found to be in the "public in-

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[39] See *id.* at 325. Thus it may be that railroads constitute at least a submarket for the transportation of heavy-loading, low value bulk commodities due to cost and service advantages available to railroads.

Just as a service submarket may have section 7 significance as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." See *id.* at 336.

[40] See Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19, 24, *aff'd mem.*, 375 U.S. 216 (1963).

terest." For this Court to enjoin permanently the merger would require that we invade the long-established province of the Commission. Resolving such considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. The wisdom and experience of the Commission, not of the courts, must determine whether the proposed consolidation is "consistent with the public interest." [41] The United States' request for a permanent injunction against the merger is accordingly denied.

Intervening-plaintiff Railway Labor Executives' Association contends that the terms and conditions imposed by the Commission to protect the interests of the railroad employees affected are inadequate and violate section 5(2)(c)(4)[42] and section 5(2)(f)[43] of

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[41] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 87-88.

[42] "In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: . . . (4) the interest of the carrier employees affected." 49 U.S.C. § 5(2)(c)(4).

[43] "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the em-

the Interstate Commerce Act and are unsupported by adequate, clear, and precise findings. The Association requests that the orders of the Commission should be declared invalid on these grounds. The Association's request, as its brief recognizes, is based on the assumption that the Commission's orders authorizing the merger are otherwise approved. Since the Commission's order must be enjoined for the reasons discussed above, consideration of the Association's contentions would be premature at this time.

The Commission found that under the merger plan the Mercantile-Safe Deposit and Trust Company will acquire power to control the merged company. It would be premature at this time for this Court to pass upon the question of whether Mercantile's power of control would be consistent with the public interest without requiring it to be considered as a carrier under section 5(3)[44] of the Interstate Commerce Act.

The orders of the Interstate Commerce Commission served December 13, 1963 and March 6, 1964 authorizing a merger of the properties and franchises of Atlantic Coast Line Railroad Company with Seaboard Air Line Railroad Company will be annulled and set aside and the enforcement of said order enjoined, all without prejudice to further proceedings

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ploy of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 49 U.S.C. § 5(2)(f).

[44] 49 U.S.C. § 5(3).

before and further findings and orders by the Commission not inconsistent with this opinion.

This the 13th day of May 1965.

/s/ Richard T. Rives
RICHARD T. RIVES
United States Circuit Judge

/s/ Bryan Simpson
BRYAN SIMPSON
United States District Judge

/s/ William A. McRae, Jr.
WILLIAM A. MCRAE, JR.
United States District Judge.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 64-64-Civ.J.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Florida East Coast Building, St. Augustine, Florida, PLAINTIFF

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

(Filed May 13, 1965, Jacksonville, Fla.)

Before RIVES, *Circuit Judge*, and SIMPSON and MCRAE, *District Judges*.

JUDGMENT

Pursuant to the opinion of the court this day entered, IT IS ORDERED, ADJUDGED AND DECREED by the court that the orders of the Interstate Commerce Commission served December 13, 1963 and March 6, 1964 authorizing a merger of the properties and franchises of Atlantic Coast Line Railroad Company into Seaboard Air Line Railroad Company, copies of which orders are attached to the original complaint in this cause, be and the same are hereby annulled and set aside and the enforcement of said orders is enjoined,

all without prejudice to further proceedings before and further findings and order by the Interstate Commerce Commission not inconsistent with the said opinion.

Done this the 13th day of May 1965.

/s/ Richard T. Rives
RICHARD T. RIVES
United States Circuit Judge

/s/ Bryan Simpson
BRYAN SIMPSON
United States District Judge

/s/ William A. McRae, Jr.
WILLIAM A. MCRAE, JR.
United States District Judge

APPENDIX C

STATUTES INVOLVED

The statutory provisions governing the Commission's approval of the consolidation of railroads are contained in section 5 of the Interstate Commerce Act, subparagraphs (2)(b), (2)(c) and (11) of which, 49 U.S.C. §§ 5(2)(b), 5(2)(c), and 5(11), provide:

> 2(b) Whenever a transaction is proposed under subparagraph (a), for the carrier or carriers or persons seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e).), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the

terms and conditions, and with the modifications, so found to be just and reasonable: PROVIDED, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless its finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * *

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the

number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control of franchises required through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

The National Transportation Policy, 49 U.S.C. preceding section 1, provides:

It is hereby declared to be the national transportation policy of the Congress to provide for

> fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

The relevant provisions of the antitrust laws are contained in sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21 which, respectively, provide, in part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the ef-

fect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

* * * * *

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

* * * * *

That authority to enforce compliance with sections 13, 14, 18 and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: * * *

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